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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

NO. 151.

HENRY BEHRENS, Petitioner,

v.

J. SCOTT SKELLY, CHARLES E. DEXTER, JR., MARC J. SANDLER, CLARENCE O. DEVORE, LIGGETT SPRING AND AXLE COMPANY and AXLETON WATER COMPANY, Respondents.

## BRIEF OF RESPONDENTS IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI.

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## BRIEF OF RESPONDENTS IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI.

### Opinions Below.

The opinion of the Court of Appeals for the Third Circuit handed down on March 16, 1949, is reported in 173 F. 2d 715. It affirmed the judgment entered pursuant to the opinion of the District Court for the Western District of Pennsylvania dated March 1, 1948, and reported in 76 F. Supp. 75.

### Jurisdiction.

Jurisdiction of this Court to entertain a petition for writ of certiorari is provided by 28 U.S.C. § 1254.

## ARGUMENT.

### Summary.

1. The Court of Appeals correctly held that the respondents were in privity with the prevailing party in the prior litigation and thus were entitled to rely upon the prior judgment as *res judicata* of the issues in this action. The decision below was not based on the doctrine of *lis pendens;* the respondents succeeded to the property involved in the prior litigation after the commencement thereof; and the allegation of conspiracy between the respondents and their vendors does not operate to deny to the respondents the defensive protection of the prior judgment.

2. If it should be held that the respondents were not in privity with the prevailing party in the prior litigation, they are nevertheless entitled to the defensive protection of the judgment entered therein under an exception to the rule of privity.

3. The prior judgment was held valid in a direct attack upon it by the petitioner and such adjudication is binding upon the petitioner, precluding collateral attack upon the validity of that judgment.

4. The court below correctly applied local law in its disposition of this action and consequently no reason for review upon certiorari is presented.

## I. The Court of Appeals Correctly Decided the Issue of Privity.

### A. *The Decision Below Was Not Based on the Doctrine of Lis Pendens.*

This petition for a writ of certiorari is an excellent example of the "tyranny of labels."* Seizing upon the Court of Appeals' use of the words "pendente lite" (R. 142), the petitioner immediately deduces that "The court below based its finding of privity * * * on the doctrine of *lis pendens* * * *" (brief p. 12), and argues (brief pp. 12-13), wholly apart from the realities of the case, that the doctrine of *lis pendens* is not applicable.

The fallacy in the petitioner's argument stems from his misconstruction of the Court of Appeals' opinion. A careful reading of the portions of that opinion in which the court spoke of the acquisition of interests in property *pendente lite* (R. 141-42) indicates not that the court was applying the doctrine of *lis pendens* but merely that the court by such reference was buttressing by analogy its conclusion that under the law of New York privity is established by a succession in interest to the same property rights occurring after the commencement of the prior action.

The court below recognized that some New York cases contain language to the effect that privity is established only where the succession in interest occurs after the date of the rendition of the prior judgment (R. 141). The court pointed out, however, that in those cases, the

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* Mr. Justice Cardozo in *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934).

question of the critical date, whether it be the institution of the prior action or the rendition of the judgment, was "not in focus" (R. 141), and found that the New York law was in accord with the well-nigh universal rule that the critical date is that of the institution of the action. *A.L.I. Restatement of the Law, Judgments,* § 89; 1 Freeman, *Judgments* (5th ed.) § 440, p. 967.

Whether or not *Hailey v. Ano,* 136 N.Y. 569, 32 N.E. 1068 (1893, opinion by Chief Judge Andrews) holds that the doctrine of *lis pendens* does not apply to an action for the recovery of damages, as the petitioner argues, is, therefore, immaterial to this controversy since the doctrine was not applied by the Court of Appeals.

It can scarcely be argued that *Hailey v. Ano* establishes a rule that there is no privity unless the succession in interest occurs after the rendition of the judgment. The petitioner does not so contend and the case does not so hold. Quite obviously the court there was not dealing with the question of the critical date of the succession in interest for determining privity in the application of the doctrine of *res judicata,* for the defendant there acquired her interest not only after commencement of the prior action, but also after the rendition of the prior judgment and was held not to be a privy, apparently because she was not an immediate successor in interest to a party to the prior action.

If, on the other hand, *Hailey v. Ano* should be construed as precluding the establishment of privity if the succession in interest occurs prior to the rendition of the former judgment, it must be considered to have been overruled *sub silentio* by *Williams v. Barkley,* 165 N.Y. 48, 58 N.E. 765 (1900, opinion by Judge Vann), where

a successor to a partial interest in property prior to the former adjudication was held bound by the prior decision adverse to his predecessor. *Application of Commercial Casualty Insurance Company,* 257 App. Div. 536, 13 N.Y.S. 2d 754 (3rd Dept., 1939, opinion by Heffernan, J.), upon which the petitioner relies in arguing point II in his brief (pp. 14-16) clearly evidences the current New York law that privity is established where the succession in interest occurs after the commencement of the prior action without regard to when the prior judgment was entered.

There can be no question but that upon the record before this Court the respondents, at the time they purchased their interests from the successful parties to the former adjudication, had actual notice of the alleged rights of the petitioner. The petitioner expressly alleges and relies upon the notice which the respondents had (complaint, paragraphs 26, 27, 28, 29, and 30, R. 13-17). Under these circumstances it is eminently proper that the respondents should have been bound by the outcome of the prior proceedings had the result in those proceedings been adverse to the respondents' vendors. For like reason, the award having been favorable, it and the judgment entered thereon should accrue to the benefit of the respondents.

B. *The Succession in Interest Occurred After the Commencement of the Prior Litigation.*

The petitioner takes issue with the conclusion of the Court of Appeals (R. 142-43) that his institution in the Supreme Court of New York on December 10, 1942, of proceedings to compel arbitration was the commencement of the prior litigation which culminated in the

award of the arbitrators and the judgment of the New York courts entered upon that award. He tacitly agrees with the court below (R. 142) that *Marchant v. Mead-Morrison Manufacturing Company,* 252 N.Y. 284, 169 N.E. 386 (1929, opinion by Chief Judge Cardozo), did not pass upon the question here in issue but dealt with the question whether a proceeding to compel arbitration is appealable so that a failure to appeal from it would foreclose collateral attack. But he argues (brief pp. 14-16) that *Application of Commercial Casualty Insurance Company, supra,* 257 App. Div. 536, 13 N.Y.S. 2d 754, is controlling in his favor and was ignored by the Court of Appeals.

That the case was not ignored but was considered by the Court of Appeals is shown by the reference to it at two places in the opinion (R. 141, 142). It is not remarkable that the court below did not see fit explicitly to demonstrate that the case was not in point. Patently, the question of the separability, for purposes of *res judicata,* of proceedings to compel arbitration and the arbitration itself was not involved there, nor does the case furnish a proper analogy. The two court actions with which that case was concerned were two ordinary, separate actions with separate and distinct interests in issue in each of them. Both of them were undoubtedly instituted by accepted methods of issuance and service of process. An arbitration proceeding, on the other hand, is not instituted in that manner in New York, but is set in motion by proceedings to compel arbitration whereby a court orders the parties to arbitrate (see R. 57-60). The proceedings to compel arbitration do not adjudicate any interest of either party but merely set in motion the procedure for determining those interests, and thus constitute the commencement of the arbitra-

tion proceeding. The analogy to the issuance and service of process for an appearance in an ordinary law suit, drawn by the court below (R. 143), is apt.

C. *Privity Is Not Defeated by the Allegation of Conspiracy.*

Proceeding from his allegation of a conspiracy, the petitioner argues (brief pp. 16-17) that under Pennsylvania law conspirators, being joint tort-feasors, are not in privity with each other and that, therefore, a Pennsylvania court, under the doctrine announced in *Bigelow v. Old Dominion Copper Mining and Smelting Co.*, 225 U.S. 111 (1912, opinion by Mr. Justice Lurton), would not recognize the privity existing between the respondents and the successful parties in the arbitration proceedings. The argument indicates a misunderstanding of the rationale of the Bigelow and other cases with respect to lack of privity among joint tort-feasors. The joint commission of a tort does not destroy privity otherwise established between joint tort-feasors by a mutual or successive relationship to the same right of property, but merely does not of itself establish privity (see 225 U.S. at pp. 129, 132; 1 Freeman, *Judgments*, (5th ed.) § 438, p. 963). In other words, joint tort-feasors are not outlaws from whom are taken rights which accrue to them from relationships which are otherwise established.

Moreover, in the case at bar the prior litigation was admittedly one for damages for breach of contract (petitioner's brief, p. 13) as the court below held (R. 144). Consequently, the judgment entered on the award of the arbitrators was not one entered in favor of an alleged

joint tort-feasor upon the cause of action arising from the commission of the alleged tort.

Finally, the complaint herein (R. 4-20), properly construed, does not allege a cause of action based upon the existence of a tort. The action is in essence one sounding in equity whereby the petitioner seeks to establish his title to the property and seeks the assistance of the court in vesting legal title in him.

## II. If the Issue of Privity Was Not Correctly Decided, the Court of Appeals' Decision Is Nevertheless Correct Under an Exception to the Rule of Privity.

While we are convinced that the Court of Appeals correctly decided the issue of privity, nevertheless, in order to sustain the decision of that court, it is not essential that such privity be held to exist since the respondents are within an exception to the rule of privity, a proposition advanced below by the respondents. This exception, which is incorporated in *A. L. I. Restatement of the Law, Judgments,* § 99, is that a judgment on the merits against the plaintiff in an action against a person for breach of contract bars a subsequent action by that plaintiff against another person based upon the existence of the same breach of contract. The exception permits the defensive use of a judgment against a party to it by one who is neither a party to the judgment nor technically in privity with a party.

This exception is fully recognized by the New York courts. *Eissing Chemical Co. v. People's National Bank of Brooklyn,* 205 App. Div. 89, 199 N.Y. Supp. 342 (2nd Dept., 1923, opinion by Jaycox, J.), affirmed, 237 N.Y. 532, 143 N.E. 731 (1923, no opinion), was an action against the bank for permitting Eissing, the president

of the plaintiff, to deposit checks drawn to the order of the plaintiff in his own account as trustee and to withdraw such checks for his own use. In a prior action by the plaintiff against Eissing and others, it was determined that plaintiff had no cause of action against Eissing because of his withdrawal of amounts in the account and conversion of them to his own use. This prior judgment was held to be available as a defense to the bank although it was neither a party to the prior action nor in privity with a party. The prior judgment determined that Eissing had not converted funds belonging to the plaintiff and this was held to bar the action which was based upon permitting such an alleged conversion.

*American Button Co. v. Warsaw Button Co.,* 31 N.Y.S. 2d 395 (Sup. Ct. Monroe Co., 1941, opinion by Wheeler, J.), affirmed, 265 App. Div. 905, 38 N.Y.S. 2d 570 (4th Dept., 1942, no opinion), was an action for damages for wrongfully inducing an employee of the plaintiff to breach his contract of employment with the plaintiff. The court held that the action was completely barred by a judgment against the plaintiff in an earlier action by it against the employee for breach of the contract of employment even though the defendant was not a party to the prior action or in privity with a party to it.

The dissenting opinion of Judge Clark in *Riordan v. Ferguson,* 147 F. 2d 983 (C.C.A. 2, 1945), contains a comprehensive review and analysis of the New York cases dealing with exceptions to the rule of privity (pp. 990-93). The conclusion which Judge Clark reached with respect to the New York law, which conclusion was not contrary to the majority opinion in that case since under the majority opinion the application of the doc-

trine of *res judicata* was not reached, is stated as follows at page 993 of 147 F. 2d:

> "It seems to me reasonably clear that New York is committed to applying the exception along broad lines to accord the defensive protection of estoppel of a former judgment to those whose liability must be founded, if at all, upon just the same issue as has been previously litigated."

This exception is an enlargement of the exceptions to the rule of privity enumerated in *Portland Gold Mining Co. v. Stratton's Independence, Ltd.,* 158 Fed. 63 (C.C.A. 8, 1907, opinion by Judge VanDevanter), the principle of which case is adopted in *A. L. I. Restatement of the Law, Judgments,* § 96 (see especially comment b thereto). Other New York cases recognizing applicable exceptions to the rule of privity are *Liberty Mutual Insurance Co. v. Colon & Co., Inc.,* 260 N.Y. 305, 182 N.E. 506 (1932, opinion by Judge Lehman) and *Good Health Dairy Products Corp. v. Emery,* 275 N.Y. 14, 9 N.E. 2d 758 (1937, opinion by Judge Finch).

## III. The Validity of the Prior Judgment Was Sustained Upon Direct Attack.

The argument of the petitioner (brief pp. 18-23) is that the award of the arbitrators which formed the basis for the prior judgment might have been void because it might have gone upon a ground alleged to be beyond the jurisdiction of the arbitrators; and that because the respondents did not prove that the award was based upon a ground within the competence of the arbitrators, the judgment entered on it is not available to sustain the plea of *res judicata.*

Although the petitioner recognizes (brief p. 19) that normally the burden of proving the invalidity of the prior judgment is upon the party who denies its validity, the petitioner argues, without benefit of authority, that this burden should not be upon him in the instant case because the judgment was based upon an award of arbitrators, who do not constitute a court of general jurisdiction. This argument is directly in the teeth of section 1466 of the New York Civil Practice Act, which provides that a judgment entered in conformity with an order confirming an award "* * * has the same force and effect, in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; * * *", as the court below held (R. 145).

The petitioner next suggests (brief p. 20) that if the burden was upon him to prove the invalidity of the award, he is entitled to an opportunity so to do. The petitioner has had that opportunity and has failed. He contested the validity of the award by direct proceedings in the New York courts, but the New York Court of Appeals held that the award was valid, *Behrens v. Feuerring,* 296 N.Y. 172, 71 N.E. 2d 454, reargument denied, 297 N.Y. 472, 74 N.E. 2d 180 (1947, opinions by Chief Judge Loughran). The petitioner is bound by this adjudication and cannot now collaterally attack the judgment, the validity of which he failed to sustain in a direct attack, *Sherrer v. Sherrer,* 334 U.S. 343 (1948, opinion by Mr Chief Justice Vinson), and cases cited at p. 350 thereof.

The petitioner takes issue with this position by arguing (brief, pp. 20-22) that by its opinion denying petitioner's motion for reargument the New York Court of

Appeals refused to adjudicate the validity of the award and specifically left the question open for decision by another court when collateral attack might be made on the judgment.

The affidavit of petitioner's counsel in the New York proceedings (R. 100-101), as well as his letter to Chief Judge Loughran (R. 109-11) furnished in support of his motion for reargument, both stressed the proposition that the respondents in the instant case were urging that the New York Court of Appeals held that the award in New York was based upon the issue of impossibility of performance, that the opinion of the Court of Appeals might be so construed, and that counsel for the petitioner felt that the court did not mean the opinion so to be construed. The respondents here were not urging that interpretation of the opinion (R. 51-53). The particular issue upon which the award was made was and is wholly immaterial since, as the petitioner admits (brief pp. 22-23), the causes of action being the same, the prior judgment is a complete bar to this action and does not operate merely as a collateral estoppel. The opinion denying the motion for reargument merely made doubly certain that the New York Court of Appeals in its first opinion did not hold that the award was necessarily based upon the issue of impossibility of performance. The denial of the motion for reargument did not, however, affect, otherwise than to strengthen, the prior holding of the New York Court of Appeals that the award was valid.

It is asserted at page 18 of petitioner's brief that "Respondents argued in their brief below that 'Eighty per cent, at least, of the content of the defense and arguments of counsel (before the arbitrators) was directed

to fraud in the inducement, 20 per cent or less to frustration * * *'. The record supports their argument (104a)." A reference to the record citation shows that the authority for this statement is the petitioner himself, not the respondents.

The New York Court of Appeals held that the issue of impossibility of performance was clearly cognizable by the arbitrators, but did not hold or suggest that the issue of fraud in the inducement of the contract was beyond the jurisdiction of the arbitrators. It expressly declined to pass upon that question, 296 N.Y. 172 at 178, 71 N.E. 2d 454 at 456. As appears from the cases referred to by the New York Court of Appeals, we believe that that question is open in the New York Court of Appeals, and the New York Supreme Court has held, in the decision from which the appeal was taken to the New York Court of Appeals, that the issue was cognizable by the arbitrators under the broad provision for arbitration contained in the agreement between the petitioner and the New York respondents, *Matter of Behrens (Feuerring)*, 182 Misc. 979, 49 N.Y.S. 2d 753 (Sup. Ct. N.Y. Co., 1944, opinion by Steuer, J.).

## IV. The Petitioner Has Failed to Establish a Proper Basis to Justify a Review by This Court.

Of the generally accepted reasons which will be considered by this Court in determining whether or not to exercise its discretion in favor of reviewing a case on a writ of certiorari, the petitioner urges that the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions (brief p. 8). Petitioner contends that the deci-

sion of the court below violated the provisions of 28 U.S.C. § 1652.

We submit that the requirement of 28 U.S.C. § 1652 is satisfied when a federal court, having jurisdiction by virtue of a diversity of citizenship, decides the case in accordance with the law of the state in which the court is sitting, *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938, opinion by Mr. Justice Brandeis). That the court below has done so in this case is conclusively shown by the fact that it expressly followed the decision of the Pennsylvania Supreme Court in a case practically on all fours with the case at bar. The Court of Appeals held that the principle of *Marsh v. Pier,* 4 Rawle (Pa.) 273 (1833, opinion by Mr. Justice Kennedy) was controlling. Pier, the owner of certain logwood, shipped it on his own vessel, bound for New York. The vessel, having become unseaworthy, put in at New Orleans, and the master of the vessel put the logwood in the hands of W. Nott & Co. to be sold by them. They sold it to S. P. Morgan & Co., who shipped it to Philadelphia to C. Price & Morgan, who sold it to Marsh. Pier sued W. Nott & Co. in New York for damages for breach of contract by reason of selling the wood and for breach of contract to account for the proceeds. Judgment was entered against Pier. Prior to the entry of the New York judgment, Pier brought replevin for the wood against Marsh in Pennsylvania. Marsh's defense was that Pier had no right of property in the logwood, and to sustain this plea, he offered the record of the New York judgment against Pier. The Pennsylvania Supreme Court, reversing the lower court, held that the New York judgment was *res judicata* of the issues in the Pennsylvania case and barred Pier's action.

In the instant case, the petitioner also sued the respondents' vendors in New York for damages for breach of contract arising in the instant case from action taken by those vendors with respect to the shares of stock and other property involved in this case. Prior to the rendition of judgment in that case, the respondents here acquired their interests in that property. In this Pennsylvania action, brought to recover that property, the prior judgment against the petitioner in New York is *res judicata* of the issues here and bars the present action, just as the prior New York judgment barred recovery in the Pennsylvania action in the *Marsh* case.

## CONCLUSION.

We submit that the decision of the Court of Appeals was fully justified upon principle and authority, that the opinion of the court below offers a reasoned basis for its decision, and that the court fully and completely satisfied its duty of deciding the case in accordance with the principles of applicable local law. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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July 20, 1949.